

Before the
Federal Communications Commission
 Washington, D.C. 20554

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FCC FILED

In the Matter of)	
)	
RULES PROMOTING)	
EFFICIENT USE,)	REPORT NO. CC 97-17
FAIR DISTRIBUTION)	CC DOCKET NO. 95-155
OF TOLL-FREE NUMBERS)	

FURTHER EX PARTE COMMENTS
TOLL FREE SERVICE ACCESS CODES

Loren C. Stocker, Managing Partner of Vanity International, hereby submits further comments on *vanity numbers* on behalf our firm, our clients, and the general public.

The Commission is basically in a quagmire. Without a fundamental shift in its thinking there may be no retreat. The current discussion is built upon the false premise that toll free numbers are merely a "public resource" and, therefore, no proprietary value is at stake. Congress has been led to believe that \$700 million in unrealized value exists where it does not. Moreover, if \$700 million did exist, an auction with the prerequisite of right of first refusal -- as promised -- would amount to blackmail. Ultimately, any course of action other than the release of "protected" 888 numbers to those who sought the Commissions protection will lead to a protracted court battle in which 800 users will prevail. Additionally, the Commission should avert the launch of "1-877" and revisit the "industry" plan.

The following comments summarize two years of thought we've given to the subject of vanity numbers. I believe these issues are fundamental to the discussion of what to do with the set aside pool, with user rights, with future SAC codes:

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Right of First Refusal is a Condition Precedent – The idea of an auction was predicated on granting right of first refusal; that was the deal. The Notice of Proposed Rulemaking states (CC Docket 95-155, 41), “Secondly, *if right of refusal is allowed*, we seek comment on a competitive bidding process.” An auction without right of first refusal would result in complaints of fraudulent inducement.

Subscribers Were Given Improper Notice – It is well documented that the carriers made only a casual effort to alert 800 holders of the set aside opportunity (see *Ex Parte Comments of Vanity International*, January, 1996). Far more troubling is that subscribers were not informed that “requested” 888 numbers might be auctioned and that competitors would be invited to bid. Carriers used identical forms for both new requests and replications with no mention of the terms. The proposed auction now constitutes a *negative option* for those subscribers who though they were simply “requesting” an 888 number. Had subscribers been given proper notice many would have opted out. Many others – who had no idea they could even participate – may have opted in.

“Vanity Numbers” are an Intellectual Property Overlay -- What’s known as a “vanity number” is actually the overlay created by the user, not the numeric itself. To illustrate, ask yourself which of the following numerics are vanity numbers: 888-782-8225, 800-356-9377, 800-248-4226, and 800-588-2300? Vanity numbers are not self-evident. These numbers are meaningless until you add word phrases like 888-*StarTAC*, 800-*Flowers* and 800-*CitiBank*. The forth, 800-588-2300, requires the addition of music; it is the locally famous jingle for *Empire Carpet* in the Chicago area. All are vanity numbers, some assembly required.

Vanity and non-vanity numerics are indistinguishable -- *Indistinguishably* is objective proof that the *intellectual overlay* is the essence of a vanity number, not the numeric. Further evidence is that the Commission cannot tell which of the 370,000 numbers on the block are highly proprietary vanity numbers like 888-*CitiBank* and seemingly generic ones like the one that got away, 888-*Flowers*. I submit that there is *no intrinsic value* in the numeric and that any and all value resides in the vanity overlay.

What’s to be Auctioned? If the vanity numbers are an overlay then they are not a “public resource” that can be auctioned by the Government. Moreover, if the numerics alone are auctioned, what is it that bidders are “buying” now that the Commission contends that no ownership interest can be established in toll-free numbers? Would bidders who “buy” two or more 888 numbers be subject to the “rebuttable presumption” of hoarding? The Commission can not have it both ways.

Functionally equivalent numerics should be priced the same -- Free.

The simple fact is that all 800 and 888 numbers work the same. Why then is numeric for 888-CitiBank subject to auction and the numeric for 888-StarTAC not? The commission has already given away 888-782-8225 for free. There is nothing special about the set aside numeric that justifies a fee.

700 million Unrealized Value Does Not Exist -- The numerics in the pool are simply 888 versions of valued 800 numbers. However, it does not follow that these 888 numerics hold value for anyone else. Trademark law and unfair practice claims should prevent a successful bidder from using the 888 number with the same vanity overlay. Yet, it is highly unlikely that some other overlay would create comparable value. For example, it should be clear that no one in America – regardless of SIC codes – could overlay the numeric 888-248-4226 as 888-CitiBank, except its rightful owner. The successful bidder would, therefore, have to create something unique to avoid a court battle with CitiBank. But, then who would pay money for 888-BitiCan or 888-AHT-4-Bank? Even numbers like 888-Flowers fail the same test -- 888-Dlowers anyone? I submit that \$700 million is the *proprietary* value of the 800 numbers, not the "public resource" value of the 888 numbers.

An Auction Combined with Right of First Refusal Constitutes Blackmail

-- The basic set-up is that the 800 holder must match the high bid, or the 888 numeric goes to the competition or anyone else who participates in the auction. This proposition is in the format of (1) pay the money or (2) we will hurt you. The "hurt" comes directly if the successful bidder is a competitor or indirectly through misdirected calls from someone else.

888 numbers drive calls to the 800 version -- When consumers hear or see "1-888" they will continue to dial "1-800." There is no compelling reason to assume this will *ever* change. Large companies with both versions will continue to advertise the more familiar 800 number, thus relegating the 888 version to a lesser stature. Currently, those companies with only the 888 numbers are driving 20- 30% of their calls to the 1-800 holder. We believe – if left alone -- that the misdial level will diminish to perhaps 15- 20%, but will never achieve the typical 2-6% level experienced between 800 numbers. The launch of "1-877" will simply add back whatever gains have been made over time. The problem is in the consumer mind, something that even 100% awareness will not change. Whenever a consumer is uncertain of the SAC, they will "try" the 1-800 version first. I submit that a permanent 20% misdial rate would be reasonable in a damage model. Radio frequencies may be transparent to users, but 800 series toll-free numbers will remain confusingly similar -- forever.

888 numbers are not just another SAC -- It is essential to recognize that the launch of 888 numbers is not analogous to a split in area codes. A new area code is compulsory for all users -- large and small alike -- and a major portion of inbound calls are local and not subject to a misdialled SAC. The launch of 888 and other meaningless codes (877, 866, etc.), however, have no such advantages. In contrast, large corporations can elect not to use 888 numbers and each and every caller must dial the correct SAC. Further, there is something fundamentally unique about toll-free numbers -- the 800 holder pays for wrong number calls.

888 users damage 800 holders -- Damages to the 800 holder can go way beyond the "billing disputes" the Commission expects to be resolved promptly. The direct damages include the cost of the 800 service and the business disruption of answering the calls. The indirect damages include the cost of being placed on the verge of being driven out of business by wrong numbers. For example, *the Methodist Physician Help Line* received 4,000 wrong numbers from confused consumers seeking the 1-888 version in one 60-day period. An average of 500 calls a week rings on a single pots line with one rollover. You can be sure that *Methodist* would have opted in to the set-aside pool had they only been told of this privilege (they were not advised). Rather, they were overwhelmed when the 888 version of their toll-free number became 888-*StarTAC*. The very premise of an auction ensures that the successful bidder will large and cause substantial damage to the 800 holder.

800 Holders Who Sought Protection Now Seek Protection from the Commission -- The deal was that right of first refusal may or may not come at a cost. In fact, one of the of the options presented by the Commission was "*free of charge.*" Since then, the auction has taken on a life of its own. The current thinking is how best to raise the 700 million. Washington has forgotten that 800 holders sought its protection and are now being sold up the river. Many of us knew without any doubt what was coming. We knew that 888 numbers were confusingly similar. We knew that misdialled calls would flood our lines and permanently disrupt our businesses. We knew this disruption would not go away after a few years as suggested by the "industry."

To summarize, 888, 877, and others 800-series SAC as analogous to *Air Rights* over the property held by the 800 holder. There is no way to build above the 800 property (888, 877, etc.) without disrupting the retail space (i.e., the 800 user) When a tenant occupies the second floor, a good portion of their customers will invariable knock on the first floor looking for the second floor tenant. Adding a third, forth, or more levels will only create further disruption.

Alternately, expanding *use specific* codes like 500 and 700, or *vanity codes* like SKY, FAX, USA, and others, or making each and every 800 *number more powerful* with Express Prompting would avert these problems altogether and allow 800 holders to conduct business in peace. Why is the Commission not exploring other options?

Respectfully Submitted,

Loren C. Stocker, P.E.
Managing Partner
Vanity International/ SoftLine Studios
2020 Lincoln Park West, Suite 16J
Chicago, IL 60614

Phone: 773-871-6565